Supreme Court of the United States

THE UNITED STATES and INTERSTATE COMMERCE COMMISSION,

Appellants,

against

THE PENNSYLVANIA RAILROAD COMPANY.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION and THE CREW-LEVICK COMPANY,

Appellants,

against

THE PENNSYLVANIA RAILROAD COMPANY.

INTERVENING PETITION FOR LEAVE TO FILE BRIEFS, &c.

THE PETITION TO BE TREATED AS A BRIEF BY AMICI CURIAE IN THE COURT SO ORDERS.

SAMUEL B. CLARKE,
CHARLES W. ATWATER,
Amici Curiae and Counsel for Petitioner,
Rate Committee,
Office and Post Office Address,
61 Broadway,
Borough of Manhattan,
New York City.

Supreme Court of the United States.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

against

THE PENNSYLVANIA RAILROAD COMPANY.

Nos. 340-341
October Term,
1916.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION and THE CREW-LEVICK COMPANY,
Appellants,

against

THE PENNSYLVANIA RAILROAD COMPANY.

Petition For Leave to File Brief, Etc.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Samuel B. Clarke and Charles W. Atwater, members of the Bar of this Court, acting as friends of the Court and also on behalf of their client, the Sterling Salt Company, respectfully shows:

4 FIRST.—That the dual capacity in which petitioners are acting seems to be justified by the remarks of the Court in the case of *Northern Securities Co.* v. *United States*, 191 U. S., 555-6.

SECOND.—That the reason why this application was not made sooner is that your petitioners were not advised that the above entitled cases had been advanced for argument until about the time of the argument and had no opportunity to examine the briefs filed by the parties until after the argument, and that since the argument some time has been consumed in suggesting to counsel for the parties
5 the advisability of themselves bringing to the attention of this Court the matters to which this petition relates.

THIRD.—That your petitioners are attorneys and counsel for the Sterling Salt Company in a proceeding (I. C. C. Docket No. 8407), submitted to and now pending decision before the Interstate Commerce Commission, which proceeding involves questions similar to questions raised in the above entitled cases now pending decision before this Court. In that proceeding the Sterling Salt Company is complainant and The Pennsylvania Rail-
6 road Company and the Genesee & Wyoming Railroad Company are respondents. The Sterling Company claims and one of the Railroad Companies admits, while the other Railroad Company did not contest the proofs that the Sterling Company mines rock salt at its plant at Halite, New York, divides the product into grades ranging in size from large lumps to particles smaller than wheat grains, and ships the separate grades, without barrels, boxes or sacks or other container, in loose bulk, in carload lots

over the lines of the respondents' railroads from Halite to various points of destination in New York and other States; that for the purpose of the shipments the respondents place ordinary box cars on railroad tracks, connected with respondents' railroads, at points convenient for loading the cars from the Company's breaker spouts which are let down into the upper part of the side door openings of the cars and the salt allowed to run through the spouts and fall on the floors of the cars; that, for convenience and economy in loading and unloading and to prevent waste of salt in loading and unloading, and in transit, it is necessary that the door openings should be tightly closed on the inside, at least to the height of a minimum load, by what are sometimes known as inside grain doors or by boards nailed to the inside of the door-posts; that in the case of each car such door equipment is supplied by the Sterling Company at an expense of about One Dollar per car; that for a considerable time prior to February 1st, 1915, the Railroad Companies made a practice of reimbursing the Sterling Company to the amount of the expense not exceeding One Dollar per car; and that by filed regulation schedules, effective the one February 1st, 1915, and the other February 15th, 1915, the Railroad Companies abrogated the practice of reimbursement and have since in that way placed the burden of supplying said inside door equipment, without reimbursement, upon the Sterling Company. The Sterling Company claims and the Railroad Companies deny that it is the legal duty of the Railroad Companies to provide and furnish said inside door equipment, and that said abrogating regulation schedules ought to be set

aside by the Interstate Commerce Commission and the prior practice reinstated.

FOURTH.—That from the briefs of the parties and letters about the oral argument received from counsel for the parties in the above entitled cases now pending in this Court, it appears (as your petitioners believe) that the points set out in article Fifth hereof (which your petitioners believe ought to be decisive of the issues in the above entitled cases and also in the said proceeding of the Sterling Salt Company before the Interstate Commerce Commission) have not been brought to the attention of this Court either orally or in writing.

FIFTH.—That said points are as follows:—

POINT I.

"Transportation", which, by Section 1 of the Interstate Commerce Act, as amended, it is the duty of the carrier to provide and furnish, is nothing more nor less than transportation provided, or to be provided, for "property transported." Hence, the partial statutory definition of transportation in Section 1 cannot be completed without the definition of "property transported", which is provided for by the statute, though not expressed therein.

POINT II.

The phrase "property transported" in Section 1 of the Act (and its synonyms in that and other sections: "property designated herein", "property for transportation", "interstate traffic for

transportation'' and ''freight'') means property which has been transported, if you are thinking of the past, and property to be transported, if you are thinking of the future, and does not include any property whatever except such as is to be or has been delivered to a consignee.

Point III.

Rate schedules being on file and in effect, the definition of a carrier's duty to provide and furnish ''transportation'' is fully closed by the commodity-description in the *separate part* of that carrier's rate schedules in which the Act (particularly Section 6 of the Act and Rule 4 of Tariff Circular 18A ''Regulations to Govern the Construction and Filing of Tariffs and Classifications'' promulgated by the Interstate Commerce Commission pursuant to Section 6 of the Act) prescribes that property which carriers offer to transport shall be described. Hence, the only question which the definition so closed leaves unsettled is as to the definition's interpretation and meaning for the purpose of its application to any particular state of facts.

Point IV.

The principles and methods of interpretation determining the meaning of the definitions so closed for the purpose of application to a particular state of facts are substantially the same as those which have been elaborated by the courts in cases arising under the import tariff laws.

Example No. 1. If the commodity-description part of the definition means that oil in barrels, or salt in sacks, or lard in pails, or

16 horses in crates, or automobiles supplied with tarpaulin covers and with wheel blocks and appliances for attaching the blocks to the floor of a car, &c., &c., is the property which the carrier offers to transport (including delivery to the consignee), the carrier is under no duty to receive from a shippper the specified commodity unless it is in the specified container or is supplied with the specified covering, &c., when tendered; but if the specified commodity is in the specified container or is supplied with the specified covering, &c., when tendered, the carrier must provide a suitable place, suitably equipped (which may be the *inside* of a suitably equipped car,
17 if the car is first placed in a proper position on railroad tracks, by whomsoever owned, connected with the carrier's railroad) for receiving the commodity from the shipper, *must receive* the commodity when tendered by the shipper at that place, must provide a suitable car, suitably equipped, for carrying the commodity to its destination, *must carry* it, must provide at the destination a suitable place, suitably equipped (which may be the inside of a suitably equipped car, if first placed in a proper position on railroad tracks, by whomsoever owned, connected with the carrier's railroad) for delivering the commodity to the consignee, *must deliver* it, *including* contain-
18 ers, covers, blocking appliances, &c., at that place to the consignee, and *must charge* and collect the specified tariff rate or charge on the commodity, *including* container or other ancillary property, and cannot impose upon the shipper or consignee the burden of supplying any property or service whatever needed for any one of these purposes; but if the carrier does not furnish all the property and services needed for the accomplishment of these purposes, and the shipper or consignee voluntarily supplies the deficiency, the carrier may, and the shipper or consignee is entitled to have the carrier, make compensa-

tion to the shipper or consignee for doing so.

Example No. 2. If the commodity-description part of the definition means that oil (or grain or coal or salt or any other commodity) without a container, and without any other sort of ancillary property, is the property which the carrier offers to transport, the carrier must receive the commodity when tendered by the shipper, without any container or other ancillary property, at the place provided by the carrier, and in other respects the carrier's duties and the shipper's rights are as stated in Example No. 1. Hence, if ordinary receiving platforms, ordinary cars and ordinary delivering platforms are not adequate means for receipt, carriage, and delivery of the oil (or salt or grain or other commodity) offered by the carrier to be "transported" without a container or other ancillary property, then additional appropriate means, such as tank cars (or grain doors, or boards tightly affixed to the inside of the door-posts of box cars, &c., &c.,), must be provided and furnished by the carrier as part of its duty to provide and furnish "transportation" for "property transported."

Point V.

The foregoing conclusions may also be arrived at by the reasoning outlined in the following Points VI-XI.

Point VI.

The Interstate Commerce Act as amended divides exhaustively all property which is in any way connected with common carrier railroad transportation of commodities on land and with which the tank cars aforesaid and the inside car

door equipment aforesaid can possibly be classified, into three mutually exclusive categories, namely:— (1) "Railroad", conceived of, generally speaking, as tracks and all ancillary realty; (2) "Property transported" and its synonyms, conceived of as tangible commodities received or receivable by carriers from shippers for carriage by railroad to destination and delivery there to consignees; (3) "Transportation", conceived of as including all the rest of the property under contemplation.

POINT VII.

The Act expressly declares it to be the duty of carriers to provide and furnish "transportation".

POINT VIII.

It follows from Points VI and VII that the question whether tank cars for the receipt, carriage and delivery of oil must be provided and furnished by carriers, and the similar question as to inside door equipment for the receipt, carriage and delivery of salt or grain or any other like commodity, may be solved by determining whether, in the first case, tank cars, and, in the second case, box cars so equipped are included in either the category of railroads or the category of property transported. If included in either of those categories, the tank cars or box cars so equipped need not be provided and furnished by the carrier; if not included, they necessarily belong to the third or transportation category and must be provided and furnished by the carrier.

Point IX.

It is manifest that neither tank cars nor box cars so equipped belong to the "railroad" category. Do they belong to the category of "property transported"? 25

Point X.

The answer to that question depends on the description (commonly styled the commodity-description) of the property which the carrier offers to transport in the separate part of the carrier's filed rate schedules in which Section 6 of the Interstate Commerce Act requires the description of such property to be stated. (See also Rule 4 of Tariff Circular 18A, "Regulations to Govern the Construction and Filing of Tariffs and Classifications", promulgated by the Commission pursuant to Section 6 of the Act.) 26

Point XI.

It follows from Points VI to X inclusive that;—

1. If the commodity-description means that petroleum oil in carload lots without any container or other ancillary property connected with it is the property which the carrier offers to transport, the carrier must provide and furnish cars adequate for receipt from shipper, carriage to destination, and delivery there to consignee of the oil which a shipper may tender in quantities corresponding to the commodity-description; *i. e.*, the carrier must provide and furnish tank cars. 27

2. If the commodity-description means that grain (or salt or other like commodity), without any container or other ancillary property connected with it, is the property which the carrier offers to transport, the carrier must provide and furnish cars adequately equipped for receipt from shipper, carriage to destination, and delivery there to consignee of the grain (or salt or other like commodity) which a shipper may tender in quantities corresponding to the commodity-description; *i. e.*, the carrier must provide and furnish box cars having inside grain doors or boards affixed to the inside of the door-posts.

Point XII.

Inasmuch as the foregoing points rest directly on the provisions of the Interstate Commerce Act, and inasmuch as the authority which the Act gives to carriers to establish and file schedules of regulations and practices is limited to such regulations and practices as are not inconsistent with the provisions of the Act, it follows that no conclusion based on the foregoing points can be invalidated or weakened by anything whatever contained in a carrier's schedule of regulations and practices; except to the extent that it may be necessary for shippers to take the proper steps to have inconsistent regulation schedules annulled.

Point XIII.

Since the statute itself provides in part by its terms and in part by reference to rate schedules the means of exact determination of a carrier's duty; since the definition of duty so provided for by the statute is the only definition to be considered, it being paramount over common law and all

other definitions; since the description of "property transported" in the rate schedules is essential to the complete closing of the statutory definition of carrier's duty; therefore (1) there is no question of reasonableness, but the question is one of strict law down at least to the interpretation of the definition as closed; and therefore (2) if the rate schedules were not brought to the attention of the Court below by the Railroad Company when the injunctions were applied for, the Railroad Company failed to present to the Court the proper basis for determining the question whether injunctions should issue and the injunctions should be set aside as having been improvidently granted. 31 32

SIXTH.—That petitioners desire to file a brief supporting said points. The brief has not yet been completed, but will be completed, signed and deposited with the Clerk of this Court and copies thereof mailed to the counsel for the parties to the above entitled cases now pending in this Court, if the Court so orders.

WHEREFORE your petitioners humbly pray:—

(1) That the Court may be pleased to receive this petition and order it on file, and to do thereupon such other things as, upon consideration thereof, to the Court may seem just and proper; or that the Court may be pleased to treat this petition as a brief. 33

SAMUEL B. CLARKE,
CHARLES W. ATWATER,
Amici Curiae and Counsel for
Sterling Salt Company,
Office and Post Office Address,
61 Broadway,
Borough of Manhattan,
New York City.

34 **Verification.**

STATE AND COUNTY OF NEW YORK, ss.:

EDWARD W. BROWN, being duly sworn, says: I reside at Dongan Hills, Staten Island, New York City. I am the Vice-President and General Manager of the Sterling Salt Company, a New York corporation having an office at 29 Broadway, Borough of Manhattan, New York City, which is also my business address; I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

35 EDWARD W. BROWN.

Sworn to before me this 8th day of November, 1916.

ALICE A. ACOSTA,
Notary Public 169,
N. Y. Co.

(SEAL)

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